Office - Supreme Court, U.S.
FILED
SEP 13 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2034

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

EVELYN FALKOWSKI,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN D. GRAD
HIRSCHKOP & GRAD, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595
OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084
COUNSEL FOR RESPONDENT

OF COUNSEL:
MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005
EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507
HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036
EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

NO. 83-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,

Petitioner,

v.

EVELYN FALKOWSKI,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Supplemental Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to Rule 22.6 of the Rules of this Court. Since the filing

of the respondent's original Brief in Opposition to the government's Petition in this case, the government has by means of its Reply Brief raised a new argument not heretofore raised in these pleadings. This Supplemental Brief will address that intervening matter.

STATEMENT

The government's Reply Brief introduced to this Court the argument that a federal employee may contest the denial of legal representation on the grounds of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. The government argues that since Title VII is the "exclusive and pre-emptive" remedy for claims of discrimination (citing Brown v. General Services Administration, 425 U.S. 820, 829 (1976)), therefore a federal employee

in the situation of Evelyn Falkowski has proper redress in the courts pursuant to Title VII and need not and cannot utilize the Administrative Procedure Act.

ARGUMENT

The government's Reply introduces to this Court the argument that Title VII is the only authority by which race or gender discrimination or reprisal may be challenged by plaintiff Falkowski with respect to her not being provided legal representation. What is thoroughly astonishing is that the government took the contrary position below.

The government's position in this case has always been that the decision to provide or not provide representation to Falkowski rested ultimately with the Justice Department. Since the Justice

Department was not her employing agency, it is not subject to Title VII. EEOC, which is subject to Title VII as her employing agency, did not have the authority to provide counsel. Accordingly, the government argued that Title VII could not be used by plaintiff to seek redress with respect to the denial of representation. In view of this past record, how the government can now argue to this Court that Title VII is, indeed, available to Ms. Falkowski to challenge the denial

of legal fees, defies comprehension.[1] Further, if, as the government now claims, Title VII is the exclusive remedy in this case but is not available to challenge the agency that makes the discriminatory decision, plaintiff is, indeed, without a remedy and the government is, in fact, exempt from judicial review.

CONCLUSION

For these reasons and the reasons

---

[1]The government also argued that Title VII would not address the allegation of discriminatory denial of counsel because it was not a "personnel" action covered by the statute or a "term, condition, or privilege of employment" under the law. The government also argued that Title VII remedies would not address a denial of counsel problem. See the attached section, Appendix A, from the Statement of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment filed in the district court and appearing as Pages 43 through 66 of the Appendix before the court of appeals. Pages 62 through 65 of the Appendix are attached as an exhibit.

set forth in the original Opposition, it is respectfully submitted that the Petition should not be granted.

Respectfully submitted,

JOHN D. GRAD
Hirschkop & Grad, P.C.
108 North Columbus Street
Post Office Box 1226
Alexandria, VA 22313
(703) 836-6595

OWEN PERRY
3290 West Big Beaver Road
Suite 510
Troy, Michigan 48084

COUNSEL FOR RESPONDENT

Of Counsel:

MARGARET BELLER
927 15th Street, N.W.
Washington, D.C. 20005

EVELYN FALKOWSKI
2401 E Street, N.W.
Washington, D.C. 20507

HERBERT R. RUBENSTEIN
1015 20th Street, N.W.
Washington, D.C. 20036

EDWARD OWEN FALKOWSKI
Post Office Box 18
Fayetteville, TN 37334

September 1984

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EVELYN FALKOWSKI, Plaintiff, v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	)	Civil Action No. 81-1776

STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT

* * *

2. Because plaintiff's Title VII Claim is not properly before this Court, and plaintiff cannot establish a prima facie case in regard to this claim in any event, this claim must also be dismissed.

Although Title VII of the Civil Rights Act of 1964 waives the sovereign immunity of the United States in certain limited situations, the plaintiff cannot

avail herself of that limited waiver of sovereign immunity in this case. This is so because Title VII is inapplicable to the discrimination and retaliation claim asserted against the EEOC and the plaintiff has not alleged compliance with the jurisdictional prerequisites for a Title VII action. The plaintiff has not alleged that she has exhausted the administrative remedies available to her under Title VII, which statute, in any event, provides neither for suits against federal agencies such as the EEOC nor for the award of relief such as is sought in this case by the plaintiff. Furthermore, even if the plaintiff could maintain a Title VII claim against the EEOC, because the Justice Department, rather than the EEOC, made the decision not to reimburse the plaintiff for her legal fees and the EEOC actually requested

that the Justice Department provide the plaintiff with legal counsel, no prima facie Title VII claim can be established against the EEOC. Finally, the plaintiff's Title VII claim is also fatally defective because even were she able to establish a prima facie case, legitimate and nondiscriminatory reasons existed for the denial of plaintiff's request for the reimbursement of her legal fees.

Section 717 of Title VII provides "an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." Brown v. General Services Administration, 425 U.S. 820, 829 (1976). As the Supreme Court held in Brown:

> Section 717(c) [42 U.S.C. §2000e-16(c)] permits an aggrieved employee to file a civil action in a federal district court to review his claim of employment discrimination. Attached to that right, however,

> are certain preconditions. Initially, the complainant must seek relief in the agency which has allegedly discriminated against him.

425 U.S. at 832. The plaintiff's Title VII cause of action therefore initially fails because she has not alleged that she has properly exhausted her Title VII administrative remedies on the specific claim asserted against the EEOC in this action.

The plaintiff's Title VII claim also must be rejected because it is brought directly against the EEOC. 42 U.S.C. §2000e-16(c) provides that in federal employee Title VII actions "the head of the department, agency, or unit, as appropriate, shall be the defendant." The courts have therefore repeatedly held that "[t]he only proper defendant in a Title VII suit...is the 'head of the department, agency, or unit' in which

the allegedly discriminatory acts transpired." Hackley v. Roudebush, 171 U.S. App. D.C. 376, 383 n.17, 520 F.2d 108, 115 n.17 (1975). See also Carter v. Marshall, 457 F.Supp. 38, 40 (D.D.C. 1978); Beckwith v. Hampton, 430 F.Supp. 183, 184 n.2 (D.D.C. 1977); Jones v. United States, 376 F.Supp. 13, 14 n.3 (D.D.C. 1974).

Even had the plaintiff complied with the procedural prerequisites for a Title VII action, though, this Court would be without jurisdiction to award to the plaintiff the relief which she seeks. "Federal employees are...provided with legal counsel in order to protect the interests of the Government, not the individual interests of the employee." Ryan v. United States, Slip Opinion, at 5 (emphasis in the original). The provision of legal counsel for federal

employees therefore constitutes neither a "personnel action" covered by 42 U.S.C. §2000e-16(a) nor a "term[], condition[], or privilege[] of employment" within the meaning of 42 U.S.C. §2000e-2. Furthermore, the affirmative relief which may be awarded to a federal employee under Title VII is restricted to "reinstatement or hiring of employees, with or without back pay..., or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g). Thus, even had she stated a valid Title VII claim against the EEOC, the relief that the plaintiff seeks in this action,

consisting primarily of damages, cannot be awarded to her.[1]

Furthermore, even were plaintiff's Title VII claim properly before this Court, she could not make out a prima facie showing that EEOC discrimination or retaliation resulted in the denial of her request for reimbursement of her legal fees. See Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). By statute, 28 U.S.C. §517, and administrative order, 28 C.F.R. §§50.15 and 50.16, the Department of Justice is vested with the authority

---

[1]Because only equitable relief such as backpay is authorized by Title VII, "[a]ll of the circuits which have addressed the matter have concluded that 42 U.S.C. §2000e-5(g) does not authorize an award of either punitive or compensatory damages...." DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980). See also Neely v. Blumenthal, 458 F.Supp. 945, 950 (D.D.C. 1978); Kinsey v. Legg Mason Wood Walker, Inc., 16 EPD ¶8168 (D.D.C. 1978).

to provide legal representation to government employees sued in their individual capacities for actions taken within the scope of their employment. Thus because the plaintiff's Title VII claim, brought only against the EEOC, is premised upon the mistaken assumption that the EEOC, itself, had the authority to grant her request for reimbursement of legal fees, no prima facie case can be established in regard to that claim.

The plaintiff also cannot establish a prima facie Title VII case because EEOC officials requested that the Department of Justice authorize legal representation for the plaintiff on several occasions. Seibert Declaration, ¶¶5, 6, 8, 12. The EEOC thus did all that it could to secure such representation for Ms. Falkowski. It was the Department of Justice, which is not sued for either

retaliation or discrimination, which determined that it would not be in the interest for the United States to reimburse the plaintiff for her attorneys fees, and the Justice Department's decision can in no manner support a discrimination or retaliation charge against the EEOC. The plaintiff, therefore, could not establish a prima facie Title VII claim against the EEOC even were that claim properly before this Court.

Finally, even if plaintiff's Title VII claim was properly before this Court and the plaintiff could somehow establish a prima facie case in regard to that claim, "legitimate, nondiscriminatory reason[s]" for the denial of plaintiff's request for legal fees exist. McDonnell Douglas Corp. v. Green, 411 U.S. at 802. As detailed in the preceding section of this brief, pp. 18-20, supra, the

provision of a legal defense to Ms. Falkowski at government expense was most definitely not "in the interest of the United States." Therefore even were the plaintiff able to establish a prima facie case of EEOC retaliation or discrimination, her Title VII claim must be rejected because she was ineligible for the benefit that she sought.

The plaintiff's Title VII claim must, therefore, be dismissed.

* * *